

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Application Submitted)	
by David C. Hinze on behalf of Frank)	Case No. 3-SE-94-614
Ribich, Jr., and Frank Ribich, Sr., for)	
Water Quality Certification to Place Fill in)	
a Wetland, City of Sheboygan, Sheboygan)	
County, Wisconsin.)	

**Findings of Fact, Conclusions of Law and
Order Approving Water Quality Certification**

Pursuant to due notice including publication, a hearing was held on May 11, 1995 in Sheboygan, Wisconsin. Mark J. Kaiser, Administrative Law Judge, presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources (Department), by

Attorney Michael Cain
101 South Webster Street
Madison, WI 53703

Frank Ribich, Jr., applicant, in person and on behalf of Frank Ribich, Sr.
1227 North 7th Street
Sheboygan, WI 53081

City of Sheboygan (City), by

Stephen G. McLean, City Attorney
807 Center Avenue
Sheboygan, WI 53081

Jeffrey C. Denning, *et al*, objectors, by

Attorney Michael J. Bauer
601 North 5th Street
Sheboygan, WI 53081

At the outset of the hearing, the objectors objected to the jurisdiction of the Division of Hearings and Appeals (Division) in this matter. The original application was denied on August 1, 1994 without prejudice. After the denial the applicant, City officials, and Department of Natural Resources employees continued to negotiate until a design acceptable to the Department was developed. No amended application was filed. The only documents showing the project as now proposed were prepared by the City. Although it would have been preferable to have had required the applicant to submit a new application describing the project as now proposed, the procedural requirements of Chapter NR 299, Wis. Adm. Code, are satisfied.

A written application is for the benefit of the Department. The objectors were made aware of the proposal by the Notice of Water Quality Certification published on November 25, 1994. The objections were filed in response to the notice and the hearing was held in response to the objections. The jurisdiction of the Division is based on the objections filed in response to the published notice. The Division has jurisdiction to hear this matter. Additionally, it should be noted that the hearing pursuant to sec. NR 299.05(6), Wis. Adm. Code, is *de novo*. The objectors were not prejudiced in any manner by the nonexistence of an amended or new written application.

FINDINGS OF FACT

1. David C. Hinze filed an application with the Department of Natural Resources for water quality certification pursuant to sec. 401, Federal Clean Water Act, and Chapter NR 299, Wis. Adm. Code. The certification is for the filling of wetlands located in the SW 1/4 of the NW 1/4 of Section 9, Township 15 North, Range 23 East, City of Sheboygan, Sheboygan County, Wisconsin.
2. The subject property is owned by Frank Ribich, Sr. and is being developed as a residential subdivision by his son, Frank Ribich, Jr. David Hinze is an agent for Frank Ribich, Jr. At the hearing the application was amended to indicate that the Ribiches are the applicants for the water quality certification.
3. The purpose of the project is to construct a city street (North 29th Street) to connect to a proposed street (Jay Road). North 29th Street will run in a north-south direction and Jay Road will run in an east-west direction. Frank Ribich, Jr. intends to plat residential lots along the sides of 29th Street and ultimately construct homes on these lots. Additionally, city sanitary sewers and water mains will be constructed in the right-of-way of North 29th Street to serve the homes constructed along North 29th Street and a proposed subdivision north of Jay Road.

4. The original application sought approval to fill .22 acre of wetlands. This application was denied without prejudice by the Department by letter dated August 1, 1994 (exhibit 5). The reason for the denial was that a practicable alternative existed which would not require any wetlands to be filled. The practicable alternative was to curve North 29th Street to the west around the wetland.
5. Curving North 29th Street to the west is not considered an economically feasible alternative by the applicants or the City because it would either (depending on the design of the curve) create double frontage lots on the west side of North 29th Street (three lots would have frontage on both North 29th Street and North 30th Street) or would create several lots which would be too shallow to be buildable.
6. After the denial David Hinze and representatives of the City worked with the Department's area water management specialist and developed a new proposal which involved no curving of North 29th Street. The new proposal shifted North 29th Street slightly to the west. During these discussions it was also discovered that the wetland had been erroneously designated and the proposal would require less of the wetland to be filled than previously thought. The current proposal was submitted to the Department by the City along with a cover letter dated October 19, 1994 (exhibit 36). The current proposal involves filling .06 acres of wetland and is acceptable to the Department.
7. The existing wetland is approximately 6.75 acres in size. The current proposal is to fill two roughly triangular parcels along the west side of the wetlands. The filled parcels would be part of the paved area of 29th Street. The proposal would result in six lots on the west side of North 29th Street and three lots on the east side of North 29th Street. The applicants would donate the remaining existing wetland along the east side of North 29th Street to the City.
8. Pursuant to sec. NR 299.05(4)(b), Wis. Adm. Code, the Department ordered David Hinze to publish a Notice of Water Quality Certification for the project. The notice was published on November 25, 1994. Several individuals objected to the proposal and requested a contested case hearing.
9. Construction of residential homes is not a wetland dependant activity.
10. Practicable alternatives exist which will not affect any wetlands. These alternatives include curving 29th Street to the west as described in paragraph five or designing North 29th Street as a cul-de-sac ending south of the wetland.

11. None of these alternatives is considered economically feasible by the applicants or the City of Sheboygan. The alternative of curving North 29th Street to the west is not acceptable for the reasons set forth in paragraph five. Designing North 29th Street as a cul-de-sac is not acceptable to the applicants because it reduces the number of lots to a number too small to be profitable and is not acceptable to the City of Sheboygan because the City intends to locate sanitary sewers and water mains for serving a proposed subdivision north of Jay Road in the right-of-way of North 29th Street. This would not be practicable if North 29th Street were designed on a cul-de-sac.

North 30th Street is within the jurisdiction of the Town of Sheboygan. The Town of Sheboygan has sanitary sewers and water service for the homes along North 30th Street. By agreement the City of Sheboygan could connect the proposed subdivision north of Jay Road to the Town of Sheboygan's system. The City of Sheboygan prefers to connect the proposed subdivision to its own system; however, the availability of the Town of Sheboygan's system does make the design of North 29th Street a practicable alternative.

12. Other than the elimination of .06 acre of wetlands, no evidence was presented at the hearing that the project as currently proposed would have any adverse impacts on the affected wetlands including any cumulative impacts attributable to the proposed project or potential secondary impacts on wetland functional values.
13. The project as currently proposed will not result in significant adverse impact to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences if it is undertaken in conformance with the conditions set forth in the order.
14. The area affected is not an area of special natural resource interest within the meaning of sec. NR 103.04, Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to sec. 227.43(1)(b), Stats., and sec. NR 299.05(6), Wis. Adm. Code.
2. The Department has the authority pursuant to sec. 144.025, Stats. and Chapters NR 299 and NR 103, Wis. Adm. Code, to review proposals for the discharge of dredge and fill material to wetlands pursuant to secs. 401 and 404 of the federal Clean Water Act.

3. The proposed project will not result in violation of the standards contained in sec. NR 103.08(3), Wis. Adm. Code in that significant adverse impacts to wetlands will not occur as a result of the proposal.
4. The subject property is not located within an "area of special natural resource interest" within the meaning of sec. NR 103.04, Wis. Adm. Code.
5. The Department has the authority pursuant to sec. NR 299.05, Wis. Adm. Code, to approve water quality certification if it determines that there is reasonable assurance that the project will comply with the standards enumerated in sec. NR 299.04, Wis. Adm. Code.

ORDER

WHEREFORE IT IS HEREBY ORDERED, in accordance with the foregoing Findings of Fact and Conclusions of Law, that water quality certification be granted for the filling of no more than .06 acres of wetlands subject to the following conditions:

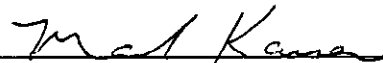
1. The applicant must notify the Wisconsin Department of Natural Resources of his intent to start the discharge at least five business days prior to the beginning of the discharge. Within 5 business days after the completion of the discharge, the applicant must notify the Department of Natural Resources of the completion of the discharge.
2. The applicant must allow the Wisconsin Department of Natural Resources reasonable entry and access to the discharge site to inspect the discharge for compliance with the certification and applicable laws.
3. The applicant is responsible for obtaining any permit or approval required by municipal zoning ordinances or by the Corps of Engineers before starting the project.
4. All utilities must be placed within the thirty foot paved area as shown on the plan submitted by the City of Sheboygan to the Department on October 19, 1994 . No work other than the 2885.5 square feet as shown on this plan shall occur in the wetland area.

5. The applicant shall place stakes defining the proposed roadway for North 29th Street prior to construction and allow neighboring property owners and their agents to view the area before any work is commenced.

Dated at Madison, Wisconsin on June 12, 1995.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By


Mark J. Kaiser
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.